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No. 289

In the Supreme Court of the United States

OCTOBER TERM, 1950

ILLINOIS MOTOR TRANSPORTATION AND U.S. ACCEPTANCE CORPORATION, PETITIONERS

v.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION, PETITIONERS

v.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents important issues with respect to the interpretation of Section 5 of the Clayton Act (38 Stat. 730, 731, 15 U.S.C. 16) which provides that a final judgment in favor of the United States in a criminal prosecution or equity action brought by it under the antitrust laws shall be prima facie

evidence in any subsequent private treble damage action. Section 5 provides:

> A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto * * *.
>
> Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

This Court has never previously had occasion to interpret the section.[1]

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[1] Cf. *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55; *United States* v. *Cooper Corp.*, 312 U.S. 600, 609. Section 5 has been involved in the following cases in the lower federal courts: *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 295 Fed. 98 (C.A. 5), affirmed on other grounds, 273 U.S. 359; *Rankin Co.* v. *Associated Bill Posters*, 42 F. 2d 152, 154 (C.A. 2), certiorari denied, 282 U.S. 864; *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37 (C.A. 1).

The Government has an interest in private suits which raise general questions bearing on effective enforcement of the antitrust laws. As this Court observed in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751-2, Congress "intended to use private self-interest as a means of enforcement" of those laws. Section 4 of the Clayton Act stimulates that self-interest by authorizing treble damage actions, including in recovery the costs of suit. Section 5 was designed to lighten the enormous burden which would otherwise rest on private suitors by making available to them the benefit of matters established by the Government in antitrust actions successfully prosecuted by it. And it encourages private suitors to await the outcome of government litigation by

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certiorari denied, 336 U.S. 967; *Turner Glass Corp.* v. *Hartford-Empire Co.*, 173 F. 2d 49 (C.A. 7), certiorari denied, 338 U.S. 830; *Fifth and Walnut, Inc.* v. *Loew's, Inc.*, 176 F. 2d 587 (C.A. 2), certiorari denied, 338 U.S. 894; *Proper* v. *John Bene & Sons*, 295 Fed. 729 (E.D. N.Y.); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (D. Minn.), affirmed, 119 F. 2d 747 (C.A. 8), certiorari denied, 314 U.S. 644; *Barnsdall Refining Corp.* v. *Birnamwood Oil Co.*, 32 F. Supp. 308 (E.D. Wisc.), *Sinaiko Bros. Coal & Oil Co.* v. *Ethyl Gasoline Corp.*, 2 F.R.D. 305 (S.D. N.Y.); *Minneapolis Gasoline & Fuel Co.* v. *Ethyl Gasoline Corp.*, 2 F.R.D. 307 (S.D. N.Y.); *Ulrich* v. *Ethyl Gasoline Corp.*, 2 F.R.D. 357 (W.D. Ky.); *Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers*, 3 F.R.D. 157 (S.D. N.Y.); *Hartford-Empire Co.* v. *Obear-Nester Glass Co.*, 7 F.R.D. 564 (E.D. Mo.); *Duluth Theatre Corp.* v. *Paramount Pictures, Inc.*, 72 F. Supp. 625 (D. Minn.); see also *United States* v. *Railway Employees' Department, A. F. of L.*, 286 Fed. 228 (N.D. Ill.); *United States* v. *Gray & Co.*, 59 F. Supp. 665 (S.D. N.Y.). Except as cited hereinafter, none of these opinions deals with the essential questions raised by this case.

tolling the statute of limitations during the course of such litigation. The United States is desirous that Section 5 should receive a construction which will fully comport with the purposes of Congress in enacting it by relieving plaintiffs in treble damage actions, to the maximum extent possible under the section, of the onerous and unnecessary burden of relitigating matters which have been tried and decided in a prior action.

STATEMENT

The petitioners are Emich Motors Corporation (Emich), formerly a dealer in Chevrolet automobiles in Chicago, Illinois (1 R. 27-8), and U. S. Acceptance Corporation, an automobile finance company, both of which are controlled by Fred Emich (2 R. 1035). Respondents are General Motors Corporation (GMC) and General Motors Acceptance Corporation (GMAC), its wholly owned subsidiary engaged in supplying credit facilities to dealers and retail purchasers of automobiles manufactured by GMC (1 R. 5-6; 29-30). Petitioners sued for treble damages under Section 4 of the Clayton Act alleging that they had been damaged by a conspiracy between the respondents in restraint of interstate commerce in automobiles manufactured by GMC (1 R. 4-27; 103-107). The amended complaint alleged that the conspiracy was the same as that charged against the respondents and others in a prior indictment on which the respondents had been found guilty by a jury; that on appeal from the

conviction the judgment had been affirmed by the court of appeals (*United States* v. *General Motors Corp.*, 121 F. 2d 376 (C.A. 7)); that this Court denied certiorari (314 U.S. 618), and that thereby the judgment became final (1 R. 8-9).

The indictment in the prior criminal case, a copy of which was attached as an exhibit to the amended complaint (1 R. 13-27), charged that defendants had conspired in restraint of interstate commerce in Chevrolet and other GMC automobiles by monopolizing the business of financing sales of those automobiles (1 R. 21). The indictment further charged that, pursuant to the conspiracy, the defendants coerced dealers to use GMAC financing facilities by various means, including threats of cancellation and actual cancellation of dealers' franchise contracts (1 R. 21-26).

In addition to the means and acts charged in the indictment in the criminal case, the amended complaint herein alleged that pursuant to the conspiracy charged in the indictment respondents threatened to cancel and did cancel the Chevrolet dealer franchise contracts of Emich, which had financed the sale of automobiles through the financing facilities of U. S. Acceptance Corporation (1 R. 105). Finally, petitioners alleged that they had been damaged as a result of respondents' alleged violations of the Sherman Act (1 R. 11, 106-107).

Respondents in their answer admitted the cancellation of Emich's franchises but denied that they

resulted from Emich's use of the facilities of U. S. Acceptance Corporation, or that the cancellations were pursuant to any conspiracy (1 R. 32). They averred that the franchises were cancelled because of violations of their terms by Emich (1 R. 32-45).

Following a pre-trial conference, the district court ruled that the judgment in the prior criminal case was "admissible as prima facie evidence of a violation by defendants of the antitrust laws of the United States" and that petitioners were "not compelled to prove a general conspiracy against Chevrolet dealers" (1 R. 114).[2] At the trial, over respondents' objection (1 R. 325), petitioners offered and the court admitted, as an exhibit to go to the jury, the indictment, verdict and judgment of conviction in the criminal case (1 R. 326; Pl. Ex. 6, 10 R. 7479). But the court excluded from the jury's consideration the remainder of the record in the criminal case, which was offered by petitioners for consideration by the jury in order that they might determine what was established by the prior criminal judgment (1 R. 422-443).[3] In so ruling, the trial court said (1 R. 443):

> all that was intended by * * * [Section 5

[2] This ruling was apparently made following a suggestion by respondents "that the trial might be shortened if the court would rule in advance of trial upon whether plaintiffs may introduce in evidence the judgment in the criminal action" (1 R. 112).

[3] Petitioners were allowed to read to the jury, over the respondents' objection, portions of the testimony of John J. Raskob in the criminal case on the theory that the testimony read contained admissions against interest (2 R. 1073-78).

> of the Clayton Act] was that plaintiffs in cases of this nature were to be accorded the advantage of establishing a prima facie case of conspiracy to violate the anti-trust laws by merely introducing the judgment of conviction in the criminal case. The nature of the evidence upon which that judgment rests is wholly immaterial and irrelevant * * *.
>
> What issues were determined by the judgment of conviction are questions of law to be decided by the court and not issues of fact to be decided by the jury in this case.
>
> The record in the criminal case, other than the pleadings which are now in evidence, is inadmissible except for the limited purpose of enlightening the court in properly instructing the jury as to the legal effect and weight to be given the evidence of conviction in the criminal case.[4]

Petitioners also called as witnesses Fred Fmich (2 R. 1035, 1441, 1585) and 16 other dealers in General Motors automobiles, all of whom testified that their dealerships were either cancelled for failure to use GMAC or that they were threatened with cancellation unless they agreed to use it to a satis-

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[4] Respondents offered, and the trial court admitted as a separate exhibit, the instructions of the trial court in the prior criminal case (9 R. 6897-8; Def. Ex. 1, printed in its entirety, 11 R. 8529-8553). The offer was made and the exhibit was received "for the limited purpose of having it before your Honor so that you may properly interpret the record at South Bend [of the prior criminal trial], and correctly instruct the jury" (9 R. 6897).

factory extent.[5] Other witnesses testified as to damages sustained by Emich.[6]

Respondents offered the testimony of 204 witnesses and many documentary exhibits to prove that the franchises of Emich had been cancelled, not because of failure to use GMAC, but because Emich's practices, including overcharging customers on retail financing, providing inadequate customer services and maintaining insufficient capital to support operations, were bringing Chevrolet into disrepute.

In his charge to the jury Judge LaBuy summarized the prior indictment, the complaint and the answer, and outlined the contested issues (9 R. 7434-7). The court charged that the burden of proof rested upon the petitioners (9 R. 7438). With respect to the effect to be given to the judgment in the prior criminal case, the district court,

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[5] Blades—2 R. 949; Burger—1 R. 535; Cohn—1 R. 386; Craig—1 R. 414; Disher—1 R. 577; Dollahan—1 R. 492; Levitan—1 R. 447; Jones—1 R. 681; Lauth—1 R. 355; Magers—1 R. 628; Mendez—1 R. 754; Morrow—2 R. 865; Munson—2 R. 869; Patterson—1 R. 474; Smason—1 R. 778; Wilson—1 R. 654. Fred Emich had also testified during the prior criminal trial that Emich's dealership was cancelled because it failed to use GMAC for financing to an extent satisfactory to the defendants. See *United States* v. *General Motors Corp.*, 121 F. 2d 376, 396 (C.A. 7).

[6] Kuehn—2 R. 1414; Trownsell—2 R. 1434; Lynch—2 R. 1480; Frank—2 R. 1435. In addition, petitioners introduced the testimony of two former GMC employees (Bahr—1 R. 406 and Zander—2 R. 939) and several hundred documentary exhibits in support of various phases of their case (10-11 R. 7473-8529).

apparently without objection from respondents,[7] charged (9 R. 7439):

> This judgment in the criminal proceedings against the two defendants in this case became final in 1941 and this judgment is admitted as evidence in this case as prima facie evidence that the defendants did enter into an unlawful conspiracy in violation of the anti-trust laws, in that they did unlawfully engage as charged in the indictment in a conspiracy in restraint of trade and commerce among the several states of General Motors automobiles, including Chevrolet automobiles, *in the manner described in the indictment* which I have summarized for you in a previous instruction. [Emphasis supplied.] [7a]
>
> Prima facie proof or evidence is that which, standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition af-

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[7] Respondents' Request No. 13 for Charges to the Jury stated (12 R. 9018):

> That judgment is admitted in evidence in this case as prima facie evidence that the defendants did enter into an unlawful conspiracy in violation of the anti-trust laws.
>
> * * * * *
>
> * * * the judgment is not evidence either of an agreement to cancel dealers who failed or refused to finance their wholesale purchases or retail sales through GMAC; nor is it evidence of an agreement to withhold or delay the delivery of cars from dealers who failed or refused to finance their wholesale purchases or retail sales through GMAC; nor is it evidence that anything was done to the plaintiffs by any kind of conspiracy.

[7a] In their brief in the court of appeals (p. 81) respondents contended that the words above italicized imported an instruction to the civil jury that respondents had been convicted of all of the acts charged in the indictment.

> firmed, and if not refuted remains sufficient for that purpose. Being prima facie evidence, the judgment is not conclusive in this case. It is merely sufficient evidence of a violation by these defendants of the anti-trust laws to put these defendants to their proof.

The district court then summarized Section 5 of the Clayton Act, and charged (9 R. 7439-40):

> In the criminal prosecution it was not necessary for the government to prove all of the acts alleged in the separate sections of the indictment. It was unnecessary that each and every one of the acts charged in the indictment be proved before the jury could find the defendants guilty of the charges made by the indictment; nor is it necessary for the plaintiffs to prove all the acts charged in the indictment for you to find that the conspiracy alleged did exist.
>
> The judgment in the criminal case was admitted in evidence in this case, pursuant to the law to which I have just referred, for the purpose of the plaintiff making a prima facie case against the defendants as to one of the issues of this case and only and solely for the purpose of defining, describing, and limiting the scope of the judgment on the verdict which was entered in that case, namely, the conspiracy to violate the anti-trust laws.
>
> The burden is on the plaintiffs of establishing by a preponderance of the evidence that they were injured by the defendants pursuant to or in the course of a conspiracy and in order

> to recover damages for the cancellation of the Chevrolet franchises they must prove by a preponderance of the evidence *including the criminal judgment*[8] that the defendants entered into a conspiracy to compel the use of General Motors Acceptance Corporation by agreeing among themselves, among other things, to cancel dealers who failed or refused to use General Motors Acceptance Corporation to a satisfactory extent and that the franchise of Emich Motors Corporation was cancelled by reason of and pursuant to said conspiracy and not because of the things alleged by defendants as the reasons for such cancellation, and to recover any damages for the failure of defendants to deliver any Chevrolet automobiles, plaintiffs must establish that defendants as part of the conspiracy agreed among themselves to withhold or delay delivery of automobiles to dealers who refused or failed to use the services of General Motors Acceptance Corporation to a satisfactory extent and that the defendants actively failed to deliver or delayed shipments of cars to plaintiffs pursuant to and as a part of said alleged conspiracy. [Emphasis supplied.]

The jury returned a verdict in favor of petitioners (9 R. 7461) and judgment was entered thereon (9 R. 7464).

On appeal to the Court of Appeals for the

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[8] Respondents specifically objected to the italicized words (9 R. 7431) which, at the request of petitioners, were inserted in lieu of the words originally in the court's proposed charge, "other than the criminal judgment" (9 R. 7428).

Seventh Circuit respondents assigned as error the admission of the judgment in the prior criminal case on the ground that it "did not create an estoppel as to any fact material in this case" and the admission of the indictment and verdict "because they are never admissible under Section 5 of the Clayton Act" (12 R. 9150). Respondents also assigned as errors references by counsel for petitioners in oral argument to the jury to the effect to be given to the prior criminal judgment[9] and "any reference" thereto in the trial court's instructions "other than to instruct the jury to disregard that judgment" (12 R. 9151).[10]

The court of appeals reversed the judgment and remanded the cause (12 R. 9470; 181 F. 2d 70). It held, first, that the *indictment* was not admissible in evidence, on the theory that, since it charged a number of restraints proof of no particular one of which was necessary to the finding of guilt, the indictment did not constitute evidence of any particular restraint (12 R. 9455). Second, it held that the prior criminal *judgment* was not admissible as evidence that Emich's franchises were cancelled pursuant to the conspiracy (12 R. 9456), but only as evidence that "defendants had been guilty of a conspiracy to restrain dealers' interstate trade and commerce in General Motors cars for the purpose of monopolizing the financing essential to the move-

[9] Respondents objected to these references during the course of petitioners' final argument (9 R. 7071).

[10] See note 7, *supra*, p. 9.

ment of those cars" (12 R. 9454).[11] It interpreted that portion of the charge which we italicized and quoted *supra*, p. 11, as authorizing the jury to consider the judgment as prima facie evidence that Emich's franchises were cancelled pursuant to the conspiracy and, as thus interpreted, held it reversible error (12 R. 9455-6). Third, the court approved the statement of the trial judge that the *evidence* upon which the criminal judgment rested was wholly immaterial and irrelevant (12 R. 9454).

SUMMARY OF DISCUSSION

I

The legislative history of Section 5 reflects a broad congressional purpose to minimize the burdens on private antitrust suitors by giving them the right to found their suits on the matters determined in successful Government antitrust actions. The bill, as it passed the House, enabled private litigants to rely only on Government equity decrees, but in conference the section was broadened so as to allow them to rely on criminal as well as civil judgments. This shows that Congress intended to give subsequent private damage suitors the same evidentiary benefits from criminal convictions as are

[11] The court also said that the judgment was "available at least for the limited purpose of establishing that there had been a violation of public rights in the absence of which plaintiffs would have no cause of action under the statute, and from which violation they assert their injury stemmed" (*ibid.*).

accorded them by judgments in Government civil suits.

II

Section 5, by its terms, makes available to private suitors a criminal judgment of conviction as prima facie evidence of "all matters respecting which" the judgment "would be an estoppel" as between the convicted defendants and the United States.

The term "estoppel," as used in Section 5, should be given a broad construction. Its legislative history shows it was designed to be a significant aid to private suitors by minimizing their burdens of proof. And since the prior judgment is only prima facie, not conclusive, evidence, a broad construction of the "estoppel" in Section 5 will not deprive a defendant of his day in court.

The general rule of estoppel is that litigants may not deny in a subsequent suit matters that were raised, controverted and determined in a prior action between them or their privies. The essential problem is to determine what matters have actually been adjudicated in a criminal antitrust case. It has been held in a subsequent civil suit by the Government that a prior criminal conviction for conspiring in restraint of trade determines that defendants used all the means charged in the indictment to effectuate the conspiracy. *United States v. Greater N. Y. Live Poultry Chamber of Commerce*, 53 F. 2d 518 (S.D.N.Y.), affirmed on other

grounds, *sub nom. Local 167* v. *United States*, 291 U.S. 293. The difficulty with this holding is that it conflicts with the rule that where an indictment charges various means by which a conspiracy is effectuated, not all of them need be proved in order to convict the defendants. Consequently, a judgment on such an indictment may not establish the performance of every means charged.

But courts may look into a prior adjudication asserted as constituting an estoppel to determine, if possible, the grounds on which the court or jury based its judgment or verdict. *Sealfon* v. *United States*, 332 U.S. 575. This determination should be made by the court rather than the jury, and in making it reference may be had to the entire record as well as the final judgment itself. When the court charges the civil jury as to the matters adjudicated by the former judgment, it may submit the indictment or pleadings in the prior case to the jury, under appropriate instructions, in order to assist them in understanding the charge.

It may be contended that it is unfair to a defendant to treat a prior judgment as adjudicating anything beyond the bare fact of violation of a section of the Sherman Act. But Section 5 only makes the prior adjudication prima facie evidence in the civil suit. It is not unreasonable to impose upon a defendant the burden of going forward with the evidence as to matters which the trial court reasonably concludes were litigated and determined in the

criminal case. And the purpose of Section 5 will thereby be furthered since the range of issues on which the plaintiff must adduce proof in order to establish a prima facie case will be narrowed.

III

Petitioners, respondents and the court below have each reached different conclusions as to the matters respecting which the prior judgment is prima facie evidence in this case. Respondents contend that it is evidence of nothing relevant to the petitioners' case. The court below held that it was evidence that respondents had been guilty of an unlawful conspiracy in restraint of trade. Petitioners assert that it is evidence that Emich's franchises had been cancelled pursuant to the unlawful conspiracy.

We think that the prior judgment is not only prima facie evidence of conspiracy but also that the conspiracy was effectuated by coercion upon GMC dealers to use the facilities of GMAC to an extent satisfactory to the defendants. Our conclusion is based upon an examination of the charge in the criminal case in which the court instructed the jury that coercion was the central issue for their determination. Moreover, it may be argued that the judgment is prima facie evidence that respondents used the franchise cancellation clause as a coercive measure to effectuate the conspiracy.

The district court's instructions as to the effect

in this case of the criminal judgment were ambiguous. At the new trial it is important that the court's ruling on the effect of the prior judgment be clear and comprehensive. And we think it is essential that the ruling be made, and the jury fully advised thereof, at the beginning of plaintiffs' presentation of their case, in order that the parties and the jury may know in advance the matters for proof of which reliance may be placed on the prior judgment. The court's ruling should be reiterated in the final charge. And it may send the indictment to the jury under appropriate instructions in order that the jury may have a clear and accurate picture of what was actually litigated and adjudicated in the criminal case.

DISCUSSION

I

Legislative History of Section 5 of the Clayton Act

In an address to a joint session of Congress on January 20, 1914, President Wilson stated (51 Cong. Rec. 1962, 1964):

> I hope that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit, and that the statute of limitations shall be suffered to run against such litigants

> only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience.

Section 5 of the Clayton Act was the congressional response to this presidential recommendation. The bill which ultimately became the Clayton Act (H.R. 15657, 63rd Cong., 2d Sess.) was said to be "in keeping" with the President's message. H. Rep. No. 627, 63rd Cong., 2d Sess., 14. Section 6 of this bill (which corresponds to Section 5 of the Clayton Act) differed from Section 5 as finally enacted in several respects. The significant difference,[12] for present purposes, was that the section applied only to government equity decrees, no pro-

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[12] The House bill also provided that the prior judgment was to be "*conclusive* evidence of the same facts, and * * * law" in a subsequent private suit (emphasis supplied). H. Rep. No. 627, 63rd Cong., 2d Sess., 2. The Senate committee which considered the bill modified the section so as to make the decree in favor of the United States merely prima facie evidence. This change was made because of doubts as to the constitutionality of the House version. S. Rep. No. 698, 63rd Cong., 2d Sess., 45, 58.

The Senate committee deleted a provision in the House bill which would also have made the prior judgments in which the United States was unsuccessful available to defendants in private suits. *Id.* at 58.

vision being made for the use of criminal judgments as evidence in private actions. H. Rep. No. 627, 63rd Cong., 2d Sess., 2. The Senate version of the section was likewise originally limited to equity actions. S. Rep. No. 698, 63rd Cong., 2d Sess., 58. In conference, however, the section was broadened so as to provide that final judgments obtained in criminal as well as civil proceedings should be prima facie evidence in subsequent private suits. S. Doc. No. 585, 63rd Cong., 2d Sess., 4; H. Rep. No. 1168, *id.*, 2. This deliberate action of a committee representing both Houses, which was subsequently ratified by them, shows clearly that Congress intended to give subsequent private damage suitors the same evidentiary benefits from criminal convictions as are accorded them by judgments in government equity suits.

The debates on the bill offer little, if any, guidance as to the precise application of Section 5, although an awareness that the language of the section creates inherent limitations on its effectiveness as an aid to private litigants is reflected in the debate in the Senate.[13] The general comments, however, reflect a desire, in accordance with the recommendations of the President, to give private litigants the benefits of the Government's prior establishment of matters involved in its antitrust

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[13] See comments of Senator Cummins, 51 Cong. Rec. 13901.

actions.[14] See 51 Cong. Rec. 9270, 9488-90, 9494, 13851, 13853-6, 15939-40, 16319.

II

The Principles of Estoppel Which are Applicable in Determining the Matters as to Which a Judgment in a Government Antitrust Case May Be Used as Prima Facie Evidence in Private Suits

Section 5 in terms makes available to private suitors a criminal judgment of conviction as prima facie evidence of "all matters respecting which" the judgment "would be an estoppel" as between the convicted defendants and United States. Thus the statute does not create any estoppel. It merely makes prima facie in a private action matters as to which, under existing law, there would be an estoppel in a Government action.

The general rule is that litigants are estopped to deny in a subsequent suit any matters that were raised, controverted and determined in a prior action between them or their privies. This doctrine "rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to

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[14] The purpose of the section was well stated in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 369 (D. Minn.):

> A defendant who stood trial and was found guilty, and against whom a final judgment was entered, became therefore subject to the use of said judgment as prima facie evidence in third party suits. Long and burdensome litigation was thereby saved to the injured third party, and the prima facie evidence of a final judgment would inure to his benefit.

litigate the same matter in a former action in a court of competent jurisdiction." *Postal Telegraph Cable Company* v. *Newport*, 247 U. S. 464, 476. The classic statement of the doctrine is found in *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 48-53, where this Court stated:

> The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.[15]

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[15] This statement was very recently quoted with approval by this Court in *United States* v. *Munsingwear, Inc.*, Nos. 23 and 24, decided November 13, 1950.

The familiar distinction between res judicata (estoppel in respect of causes of action) and collateral estoppel or estoppel by judgment (estoppel in respect to decided issues) [16] is of no relevance here. Section 5 applies without qualification to all matters as to which there is an estoppel, in the broadest sense, between the parties. It makes no use of the terms of art "res judicata" or "estoppel by judgment".[17]

Apart from the literal terms of Section 5, there are compelling reasons for giving the term "estoppel" the broadest permissible construction. First, the legislative history of the section shows that its purpose was to implement President Wilson's recommendation that the burden on private antitrust plaintiffs be lightened by permitting them "to found their suits for redress upon the facts" proved by the Government to establish conspiracy in restraint of trade. Second, it is important to bear in mind that the prior judgment is only prima

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[16] See *Russell* v. *Place*, 94 U.S. 606, 608; *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-8; Scott, *Collateral Estoppel by Judgment* (1942), 56 Harv. L. Rev. 1; Restatement, Judgments, § 68(2).

[17] The word "estoppel" does not itself connote either one or the other. Congress may be presumed to have been familiar with the decisions of this Court rendered prior to the passage of the Clayton Act in which the two terms were used interchangeably. *Cromwell* v. *County of Sac*, 94 U.S. 351, 353; *United States* v. *Parker*, 120 U.S. 89, 97; *New Orleans* v. *Citizens' Bank*, 167 U.S. 371, 396; *Troxell* v. *Delaware, Lackawanna and Western R. R. Co.*, 227 U.S. 434, 440. We have found but one decision in which the term "estoppel" in Section 5 has been assumed to refer to "estoppel by judgment". See dictum in *Fifth and Walnut, Inc.* v. *Loew's, Inc.*, 176 F. 2d 587, 593 (C.A. 2), certiorari denied, 338 U.S. 894.

facie and not conclusive evidence in a subsequent civil suit. In the ordinary case where a party seeks to invoke the doctrine of res judicata, he does so in a context where a favorable ruling will totally preclude any opportunity for refutation. In a Section 5 situation, however, the principles of res judicata are merely made the criteria for ascertaining the matters which are prima facie evidence in a subsequent civil suit. The defendant is not in any sense estopped or precluded from making his defense; he has complete freedom at the trial to rebut the prima facie evidence. Thus there is no question of depriving a defendant of his day in court.

The difficult problem under Section 5 is to determine what matters have actually been adjudicated in the criminal case since it is clear that the judgment is evidence of all "issues adjudicated." See *United States* v. *Cooper Corp.*, 312 U.S. 600, 609. In a civil case in which a judgment is rendered by a court which makes special findings of fact and conclusions of law, it is usually possible to ascertain without much difficulty what has been decided. But where the issues of fact are determined by a jury on a general verdict, this determination is usually difficult and sometimes impossible. Compare *De Sollar* v. *Hanscome*, 158 U.S. 216, 222; *Russell* v. *Place*, 94 U.S. 606.[18] The difficulty is

[18] The judgment interposed in *Southern Pacific Railroad* v. *United States*, *supra*, and the line of cases on which it relies were civil judgments. But we derive little guidance from those few cases decided by this Court we have found where a

almost invariably present where, as is true here and in almost all antitrust criminal actions, the indictment charges defendants with having used more than one means to effectuate a conspiracy.

Even in the narrowest view of the doctrine of estoppel, a general verdict of a jury, or a judgment of a court without special findings, is conclusive in favor of the prevailing party as to all determinations which are essential to sustain the judgment. *Fayerweather* v. *Ritch*, 195 U.S. 276. On the other hand, it has been suggested that a criminal conviction for conspiracy determines that defendants used all the means charged in the indictment to effectuate the conspiracy, or at least all those concerning which the Government at the trial introduced evidence. *United States* v. *Greater N. Y. Live Poultry Chamber of Commerce*, 53 F. 2d 518 (S.D. N.Y.). In that case the United States had sued under the Sherman Act for an injunction to

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prior criminal judgment of conviction or acquittal has been held res judicata either in a subsequent civil or criminal case between the United States and the same defendants. See *Coffey* v. *United States*, 116 U.S. 436; *Chantangco* v. *Abaroa*, 218 U.S. 476 (interpreting local law of the Philippine Islands); *United States* v. *Oppenheimer*, 242 U.S. 85; *Local 167* v. *United States*, 291 U.S. 293; *Sealfon* v. *United States*, 332 U.S. 575. This list excludes those cases starting with *Gelston* v. *Hoyt*, 3 Wheat. 246, involving prior judgments in libels against vessels for alleged offenses.

The cases interpreting the constitutional prohibition against double jeopardy are irrelevant since the Constitution has been interpreted as prohibiting *charging* a person, already previously placed in jeopardy, a second time with the same offense. In such cases it is the prior indictment and not the prior judgment which provides the basis for determining whether the second indictment charges the same offense as the first. *Burton* v. *United States*, 202 U.S. 344, 378-81.

restrain continuation of a conspiracy for which some of the defendants had been convicted in a prior criminal proceeding. See *Greater N. Y. Live Poultry Chamber of Commerce* v. *United States*, 47 F. 2d 156 (C.A. 2), certiorari denied, 283 U.S. 837. In their answer to the civil petition defendants denied that they had ever been parties to the conspiracy charged. The United States, relying on the doctrine of res judicata, moved to strike as sham all allegations in the answers of those defendants previously convicted denying participation in the conspiracy up to the date of the prior indictment. Judge Woolsey granted the Government's motion, stating (53 F. 2d at 520):

> Examination of this judgment roll shows that any denials by the defendants in this suit who were convicted in the criminal action of the first twenty-three paragraphs of the petition or of any one of those paragraphs, or of any of the allegations therein contained, are sham denials made for obstructive purposes only, and therefore should be stricken out.[19]

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[19] In a previous opinion by Judge Bondy on the same point in the same case, the court said (44 F. 2d 393, 394):

> As to the defendants in this suit, who were found guilty of the crime charged, the conviction is conclusive of the fact that they were engaged in a conspiracy to restrain trade and did every act which was essential to establish the same.
>
> These defendants accordingly cannot deny and it is sham for them to deny the allegations in paragraph 16 of the amended petition that they entered into and engaged in a conspiracy in restraint of trade and commerce among the several states of the United States.
>
> The petition alleges innumerable acts on the part of

The first 23 paragraphs of the petition included the charging paragraph and the paragraphs alleging "means and method" (see Record in No. 6, Oct. Term 1933, p. 14).

At the conclusion of the trial, the district court entered a judgment enjoining the defendants from engaging in the unlawful practices. Defendants appealed, and one of their grounds was Judge Woolsey's order striking various parts of the defendants' answers. This Court affirmed the order. *Local 167* v. *United States,* 291 U.S. 293. But it did not specifically pass upon the question whether the prior judgment of conviction was res judicata in the subsequent civil suit of all the means charged in the indictment, as Judge Woolsey had ruled.

The difficulty with the principle applied by Judge Woolsey arises from the rule that where an indictment charges various means by which a conspiracy is effectuated, not all of them need be proved in

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the defendants. Though some of the denials may be false, the falsity of any particular denial does not follow from the fact that there has been a conviction on the charge of conspiracy.

The motion to strike out the other denials on the ground of the conviction therefore must be denied without prejudice to a motion to strike out as sham any denial of any specific fact shown to have been essential to conviction or which petitioners otherwise can prove to be sham.

No order was entered on this opinion. See 53 F. 2d at 519. It was Judge Woolsey's opinion upon which the order striking various portions of the answers as sham was founded.

order to convict the defendants. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S 150, 250. Consequently, a conviction on such an indictment does not in itself necessarily establish the performance of every means charged, or of any particular means. It does not follow from the rule of the *Socony-Vacuum* case, however, that where many means are charged, a general verdict of guilty precludes inquiry as to whether, in the particular case, the record does establish facts underlying the verdict. Indeed such a consequence would reward the defendants who use divers means to effectuate a conspiracy.

Courts may examine into the grounds on which a jury bases its verdict. In *Sealfon* v. *United States*, 332 U. S. 575, the petitioner had been acquitted by a jury of conspiring with another to defraud the United States. Thereafter he was put on trial and convicted, as an aider and abettor, for the substantive offense of defrauding the United States. On writ of certiorari to this Court, Sealfon asserted that the judgment of acquittal of conspiracy had necessarily also established his innocence as an aider and abettor, and that his innocence was res judicata.[20] The United States argued that the basis of the jury's verdict could not be known with certainty, and that under the instructions

[20] A contention as to double jeopardy was abandoned in this Court. 332 U.S. at 578.

given in the conspiracy trial, the jury might have found that Sealfon was a member of a conspiracy comprising less than all the parties defendant and yet been unable to conclude that he was a party to the over-all conspiracy charged in the indictment. This Court, however, examined the indictment, the evidence and the instructions in the prior case "for such light as they shed on the issues determined by the verdict" and concluded that "the earlier verdict precludes a later conviction of the substantive offense" because the "basic facts in each trial were identical." 332 U.S. at 579-580. Cf. *De Sollar* v. *Hanscome*, 158 U.S. 216, 22[illegible].

The *Sealfon* case applied the well-established rule (which was adhered to by the district court in this case, 1 R. 443) that in determining what was decided by the prior judgment, reference may be had to the entire record, including the pleadings, the evidence, the charge to the jury (or the findings of fact and conclusions of law, if a non-jury case) as well as the final judgment itself.[21] It would seem, as both courts below held, that this determination

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[21] *Packet Company* v. *Sickles*, 5 Wall. 580; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U.S. 683; *De Sollar* v. *Hanscome*, 158 U.S. 216, 221-2; *Russell* v. *Place*, 94 U.S. 606, 608; *Hornbuckle* v. *Stafford*, 111 U.S. 389, 391, 393; *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316, 329; *Baker* v. *Cummings*, 181 U.S. 117; *National Foundry &c* v. *Oconto Water Supply Co.*, 183 U.S. 216, 234; *Lander* v. *Mercantile Bank*, 186 U.S. 458; *Fayerweather* v. *Ritch*, 195 U.S. 276, 306; *Vicksburg* v. *Henson*, 231 U.S. 259; *Oklahoma* v. *Texas*, 256 U.S. 70, 88; *United Shoe Machinery Co.* v. *United States*, 258 U.S. 451 (antitrust case); *United States* v. *Greater*

should be made by the court and not by the jury[22] unless evidence outside the record of the prior litigation must be resorted to in order to determine its scope, in which event such evidence is submitted to the jury.[23]

N. Y. Live Poultry Chamber of Commerce, 53 F. 2d 518 (S.D. N.Y.), affirmed *sub nom. Local 167* v. *United States*, 291 U.S. 293.

[22] 2 Black on Judgments (2nd Ed., 1902) § 631; 2 Freeman on Judgments (5th Ed., 1925) § 767; 30 Am. Jur. Sec. 275, p. 994. The *Sealfon* case, *supra*, implicitly decided that it is the court and not the jury which determines this question. See also the Court of Appeals' opinion in the same case, 161 F. 2d 481, 484 (C.A. 3); *United States* v. *Greater N. Y. Live Poultry Chamber of Commerce*, 53 F. 2d 518 (S.D. N.Y.); *Ramsay Co.* v. *Associated Bill Posters of the U. S. & C.*, 271 Fed. 140 (C.A. 2) (Clayton Act case); cf. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 295 Fed. 98, 101-2 (C.A. 5), affirmed on other grounds, 273 U.S. 359 (Clayton Act case); *United States* v. *De Angelo*, 138 F. 2d 466, 468 (C.A. 3).

[23] See *op. cit.* in the preceding note. In *Packet Company* v. *Sickles*, 5 Wall. 580, this Court had under review the conduct of a trial in which some of the jurors in the trial of a former case had been permitted to testify as to the particular ground on which they founded their verdict. This Court disapproved the practice and stated (pp. 593-4):

> There is another suggestion, also, it may be proper to make, growing out of the rule, now very general both in the Federal and State courts, to admit the record of a former trial as evidence to conclude a party from agitating the same matters in a second suit, and that is where the *extrinsic* proof of the identity of the cause of action is such that the court *must submit the question to the jury* as a matter of fact; any other matters in defence or support of the action, as the case may be, should be admitted on the trial, under proper instructions. For, if the jury should find against the conclusiveness of the former trial, then this additional evidence would not only be material, but constitute the whole of the proof on which the cause of action or defence must rest. If the extrinsic evidence should be so conclusive that *the court* could properly hold the record to be conclusive,

But the rule that where res judicata is pleaded it is generally the function of the court and not the jury to determine the scope of the estoppel is not necessarily determinative of the question whether the pleadings, or other pertinent documents, in the prior case may go to the jury under proper instructions. The submission of the indictment or pleadings may materially assist the jury in understanding the court's charge regarding the matters adjudicated by the prior judgment. See *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 295 Fed. 98, 101 (C. A. 5), affirmed on other grounds, 273 U.S. 359. In any event, if Section 5 is to be used, as was intended, as a substantial aid to private antitrust litigants by minimizing their burden of proof, the trial court must reach beyond the prior formal judgment or decree and recreate and define, for presentation to the jury, the scope of the conspiracy to which the defendants were parties and the matters settled by the prior Government action. In seeking to reconstruct this holding for the benefit of the civil jury, the trial judge, it is submitted, should review the pleadings, evidence, findings of fact and conclusions of law (or the charge to the jury and verdict in a criminal case), to such an extent as is necessary, and present to the civil jury, by appropriate instructions and, if necessary, ex-

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the trial would of course be at an end, so far as the matters embraced therein were identical with those in controversy. [Emphasis supplied.]

See also *Russell* v. *Place*, 94 U.S. 606, 608; *Fayerweather* v. *Ritch*, 195 U.S. 276, 306-7.

cerpts from the prior record, a clear and accurate picture of what was litigated in the former proceeding.

It may be contended that it is unfair to defendants to establish a rule under which a court, in a subsequent civil suit, may treat a criminal judgment as adjudicating anything beyond the general statement found within its four corners, *i.e.*, that defendants have been found guilty of violating a section of the Sherman Act. It may be said that any attempt to enlarge the scope of the criminal judgment requires inferences from the indictment and charge, and perhaps even an analysis of the evidence. Whatever the force of that argument in other situations, it can have little weight in the context of Section 5 of the Clayton Act. The court's determination, for the purposes of that section, of what was decided in the criminal case merely determines what shall be prima facie evidence in the civil case. We submit that it is not unreasonable to impose upon defendants the burden of going forward with the evidence as to matters which the trial court reasonably concludes, upon its examination of the prior record, were litigated and determined in the criminal case. And the effectuation of the purpose of Section 5 is materially aided by narrowing the range of issues upon which the plaintiff must adduce proof in order to establish a prima facie case.[24]

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[24] See n. 28, p. 38, *infra*.

III

The Effect of the Criminal Judgment Against Respondents as Prima Facie Evidence in the Present Action

Our discussion in the preceding section has been directed to the general principles of the law of estoppel which are applicable to private antitrust suits founded on a prior judgment obtained by the United States. As we observed at the beginning of that discussion (*supra*, p. 22), in order to effectuate the purpose of the statute, estoppel, when applied to a case involving Section 5, should be given the broadest possible construction consistent with its terms.

Petitioners, respondents and the court below have each reached different conclusions as to the matters respecting which the criminal judgment is prima facie evidence in this case. Respondents took the view in their appeal that the judgment was evidence of nothing of relevance to the petitioners' case (12 R. 9151; *supra*, p. 12). The court below held that the judgment was prima facie evidence that respondents had been guilty of a conspiracy to restrain dealers' trade in GMC cars for the purpose of monopolizing the financing of those cars (12 R. 9454; *supra*, pp. 12-13). Petitioners go further and insist in their specification of errors in this Court that the judgment is prima facie evidence that Emich's franchises had been cancelled pursuant to the unlawful conspiracy in restraint of trade.

We find ourselves unable to agree with any of

these conclusions. We think that the prior judgment is not only prima facie evidence of the conspiracy, as found by the court below, but also evidence that the conspiracy was effectuated by coercion upon GMC dealers to use the facilities of GMAC to an extent satisfactory to the defendants. Our conclusion is based upon an examination of Judge Lindley's charge to the jury in the criminal case. We believe that it shows that the jury could only have convicted if it was convinced beyond a reasonable doubt that defendants had effectuated the conspiracy by forcing dealers to act against their will. After explaining the charges in the indictment in detail to the jury, Judge Lindley instructed them that the Government (Def. Ex. 1, 11 R. 8537):

> * * * can only complain if the defendants do sufficient of these acts charged in the indictment as to amount to duress upon the dealer to accomplish a result that would not otherwise not have been accomplished, and to force the dealer to do something that he would not have done of his own free will.
>
> That almost is the fact question in this case, whether the dealer could act as a free man; * * *

After alluding to the testimony of the witnesses produced by the Government on the issue of coercion, Judge Lindley continued (Def. Ex. 1, 11 R. 8538):

> Against that the defendants have offered their testimony that they never have used

> force; that they never have insisted; that they never have used this right of cancellation, this one-year contract with the right to renew it or not, or any of the other things complained of, as clubs or instruments of coercion.[25]

During the course of its deliberations, the jury returned for additional instructions. Included in the additional charge was the following (11 R. 8548):

> But the charge in this indictment is that they utilized a contract which was limited to one year and might or might not be renewed and a cancellation clause in that contract upon short notice and discrimination in the shipment or non-shipment of automobiles,—used them as a club upon their dealers, and thereby coerced them to use something which they, as free agents, would not have used.
>
> That is the groundwork upon which this charge is brought, and whether they did or not is a question of fact which you alone can decide.

Not only the above excerpts but Judge Lindley's charge as a whole indicates that a verdict of guilty could be returned only if the jury found that defendants had employed coercion upon their dealers in order to have them use the financing facilities of GMAC. It is relevant to note that the court

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[25] Judge Lindley also charged that it was not essential to the finding of guilt that every act charged in the indictment be proved (11 R. 8536).

below, which also passed on the defendants' appeal in the criminal case, shared this view. That court, in dealing with the sufficiency of the evidence, stated (*United States* v. *General Motors Corp.*, 121 F. 2d 376, 397 (C.A. 7)):

> It is clear that the evidence in this case tends to show a conspiracy having as its purpose the control by appellants of the dealers' financing * * *.
>
> It is even plainer that the *jury finding of coercion* is supported by the evidence. The coercive practices were many and varied (not all detailed in this opinion), and directly aimed to compel dealer-purchasers to use GMAC in financing the wholesale purchase and retail sale of General Motors cars.[26] [Emphasis supplied.]

Indeed, there is some justification for the argument that the judgment should be available as prima facie evidence that the respondents used the franchise cancellation clause as a coercive measure in effectuating the conspiracy. The Government's case in the criminal proceeding relied heavily upon the testimony of 38 ex-GMC dealers that defendants had cancelled their franchises when they failed to use GMAC to a satisfactory extent. See *United States* v. *General Motors Corp.*, 121 F. 2d 376, 395 (C.A. 7). Because there was some other evidence in the case, including the testimony of 10 dealers

[26] The court of appeals' opinion in the criminal case was written by Judge Kerner who also wrote the opinion below.

whose franchises had not been cancelled, concerning coercive practices other than franchise cancellation (*ibid.*), it of course cannot be demonstrated as a logical certainty that the jury's determination was based upon the finding of coercive use of the cancellation clause. The fact remains, however, that an examination of the entire record in the criminal case could well convince the judge in the treble-damage action that the charge of coercive use of the cancellation clause was the core of the Government's case, and that the jury must have found that charge proved when it convicted.

For these reasons we think that the court below erred in holding that the judgment was prima facie evidence only of the general conspiracy. Whether or not the criminal judgment was evidence that coercion was implemented through franchise cancellation, it was certainly evidence of coercion. A holding that the jury rendered its verdict without concluding that defendants coerced their dealers to use GMAC can only be justified on the assumption that the jury decided the case upon some theory other than that given to them in the charge—an assumption that cannot be made. See *Dunn* v. *United States*, 284 U.S. 390; *Fayerweather* v. *Ritch*, 195 U.S. 276.

Since there will have to be a new trial regardless of this Court's ruling on the questions to be determined on this review, it may be appropriate to indicate the approach which should be taken at the trial

with respect to the evidentiary effect of the criminal judgment.

The trial court's instructions relating to the criminal judgment were not entirely clear and hence were susceptible to the interpretation placed upon them by the court below; namely, that the judgment was prima facie evidence that Emich's franchises were cancelled pursuant to the conspiracy of which respondents were convicted. Although we are convinced from an examination of the entire record that the trial judge never varied during the trial from the position taken in his memorandum following the pretrial conference that the criminal judgment was prima facie evidence only of conspiracy (1 R. 114; *supra*, p. 6),[27] the instructions quoted *supra*, pp. 9-11, may be read as stating that the judgment is prima facie evidence of the truth of everything charged in the indictment.

We think it essential not only that the court's determination of the matters as to which the criminal judgment is prima facie evidence should be made crystal clear to the jury, but that the determination should be announced and the jury so instructed at the beginning of plaintiffs' presentation of their case. In a trial as lengthy and complicated as that in the case at bar, a trial judge must

[27] He reiterated this position when he excluded from the jury's consideration the record in the criminal case (1 R. 443; *supra*, pp. 6-7).

be careful to see that such an important issue is determined and fully explained to the jury before the conclusion of the plaintiff's case; otherwise a plaintiff who founds his suit on a prior judgment will not know in advance of trial to what extent he may rely upon the prior judgment to make a prima facie case.[28] In addition, in order to follow intelligently the remainder of plaintiff's evidence, the jury must know early in the proceedings what it was that the criminal case decided and the weight they are to give to the judgment in that case.[29]

At the close of the case the trial court's ruling on the prior judgment should be reiterated and incorporated in the charge. And, as previously indicated (p. 30), we think that the indictment is admissible in evidence and may go to the jury during their deliberations in order to assist them in understanding that portion of the charge relating to the matters made prima facie evidence by the criminal judgment. Of course, the judge should make clear to the jury the precise legal significance of an indictment. In addition, if the trial court considers it

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[28] Thus, if the criminal judgment is here only prima facie evidence of conspiracy, as the court below held, the plaintiffs may feel compelled, as they did in the first trial, to introduce independent evidence that the franchises of other dealers were cancelled because of failure to use GMAC. On the other hand, if the judgment is held to be prima facie evidence of franchise cancellations it, together with the admission of respondents that Emich's franchises were cancelled (1 R. 32), would virtually establish a prima facie case, except for the issue of damage.

[29] An early decision of this issue has the further advantage of obviating improper argument to the jury by counsel.

advisable in order that his instructions may be fully understood, he may submit to the jury the charge in the criminal case or excerpts therefrom. In short, the jury is entitled to see anything in the prior record which, in the sound discretion of the trial court, it is necessary that they have in order to obtain a clear and accurate picture of what was actually litigated and decided in the criminal case.

Respectfully submitted.

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DECEMBER, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 919726 979